

CUSTOMER INFORMATION BULLETIN



No. 55, February 12, 1993

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- A. Guardianship and Administration Act 1990
Enduring Powers of Attorney - Sections 102 - 110**

The Act came into operation on the 1st day of July 1992. It creates a new form of power of attorney in this State - the Enduring Power of Attorney.

What is an Enduring Power of Attorney?

- It is a general power of attorney authorising the donee to do anything that the donor could legally do.
- It makes provision for restricted powers.
- The powers are not revoked by the subsequent legal incapacity of the donor.

An Enduring Power of Attorney that is in force shall be effective for the purposes of the Transfer of Land Act (and Property Law Act) as if it were in the form provided for by Section 143 of the T.L.A.

The Guardianship and Administration Board (the "Board") became fully operational on the 20th day of October 1992 with power to appoint administrators and make administration orders. Accordingly, under section 108 of the Act, Enduring Powers of Attorney may be revoked or amended by the Board or, by an administrator of the estate.

2. Enduring Powers of Attorney - Form and Execution

The power must be substantially in the form of Form 1, Third Schedule.

SCHEDULE 3

[section 104]

Form 1

ENDURING POWER OF ATTORNEY

This Enduring Power of Attorney is made on the day of.....19.....,
by A.B. of under section 104 of the *Guardianship and Administration Act 1990*.

1. I APPOINT C.D. of
(or C.D. of and E.F. of jointly)
(or C.D. of and E.F. of jointly and severally)
to be my attorney (s).
2. I AUTHORISE my attorney(s) to do on my behalf anything that I can lawfully do by an attorney.
3. The authority of my attorney(s) is subject to the following conditions or restrictions -
.....
.....

4. I DECLARE that this power of attorney * -

- * One of these paragraphs must be deleted.
- (a) will continue in force notwithstanding my subsequent legal incapacity; or
 - (b) will be in force only during any period when a declaration by the Guardianship and Administration Board that I do not have legal capacity is in force under section 106 of the *Guardianship and Administration Act 1990*.

SIGNED AS A DEED by:

WITNESSED by:

.....
(Signature of Witness)

.....
(Signature of Witness)

.....
(Name of Witness)

.....
(Name of Witness)

The donor's signature must be witnessed by two persons authorised to take declarations. Although the form does not make provision for the capacity of the witnesses to be shown, this will need either to be shown on the form or in a statutory declaration by the witnesses.

A Statement of Acceptance by the donees substantially in the form of Form 2 in Schedule 3, must be endorsed on or annexed to the Enduring Power of Attorney

ACCEPTANCE OF ENDURING POWER OF ATTORNEY

I/We, the persons(s) appointed to be the donee(s) of the power of attorney created by the instrument on which this acceptance is endorsed [or to which this acceptance is annexed] accept the appointment, and acknowledge -

(a) that the power of attorney is an enduring power of attorney and * -

* One of these paragraphs must be deleted.

(i) will continue in force notwithstanding the subsequent legal incapacity of the donor;

(ii) will be in force during any period when a declaration by the Guardianship and Administration Board that the donor does not have legal capacity is in force under section 106 of the *Guardianship and Administration Act 1990*; and

(b) that I/we will, by accepting this power of attorney, be subject to the provisions of Part 9 of the *Guardianship and Administration Act 1990*.

Signed

.....

(Donee(s) of the Power of Attorney).

The donor must place one of two limitations on the power of attorney. One of the limitations in the prescribed form must be deleted and preferably initialled by all parties. Limitations in the statement of acceptance must be identical to those in the power of attorney.

The Donor's options are:

OPTION A

Will continue in force notwithstanding the donor's subsequent legal disability.

OPTION B

Will be in force only during any period when a declaration by the Guardianship and Administration Board that the donor does not have legal capacity is in force under section 106 of the *Guardianship and Administration Act 1990*. The power of attorney becomes effective only when the above condition applies.

3. Non Revocation or Variation Declaration - When Required

In accordance with current practice for powers of attorney that is based on section 143(2) of the *Transfer of Land Act* ("TLA"), whenever an Enduring Power of Attorney (which is dated more than 3 months prior to the date of deposit) is deposited for filing and noting, a Statutory Declaration of non-revocation or variation is to be obtained from the donee of that power.

As with other types of powers of attorney, in appropriate cases, requisitions may issue under section 143(4) of the TLA for a further Statutory Declaration when a document executed by a donee of that power of attorney is lodged.

For example, such a requisition will issue if the Registrar is aware that:

- the Board or an appointed administrator (including the Public Guardian) of the estate of the donor has varied or revoked an Enduring Power of Attorney under section 108 of the Act; or
- a substitute donee of the power of attorney has been appointed pursuant to section 109(1) of the Act.

Naturally, if any of the above situations apply, then, an appropriate Statutory Declaration, should be lodged before a requisition issues.

In the cases mentioned above, such statutory declarations declaring the matters set out in subparagraphs (a-g) in paragraph 4 below should be provided or a further requisition will be issued.

4. Non Revocation or Variation Declaration - Contents

4.1 Enduring Powers of Attorney that continue in force, notwithstanding the donor's subsequent incapacity.

A donee of such a power should, in the declaration accompanying the power of attorney or other document,

- a) identify himself/herself as the donee or a duly appointed substitute donee;
- b) identify the Enduring Power of Attorney by reference to the donor and the date of the instrument;
- c) state that the donor is still alive;
- d) state that such power of attorney has not been revoked or varied by the donor (Section 143 TLA and Section 85 PLA) or the Board (Section 108 of the Act);
- e) (i) state that no administrator has been appointed under sections 64, 65 or 66 of the Act to act on behalf of the estate of the donor; or
(ii) if an administrator has been appointed to act on behalf of the estate of the donor,
 - state that an administrator has been appointed on behalf of the estate of the donor under section 64, 65 or 66 of the Act as the case may be,
 - annex a sealed copy of the order appointing the administrator, and
 - state that such power of attorney has not been revoked or varied pursuant to section 108 of the Act by an appointed administrator of the estate of the donor ;
- f) (i) state that a substitute donee has not been appointed by the Board pursuant to section 109 of the Act; or
(ii) state that the donee is a substitute donee appointed by the Board pursuant to Section 109 of the Act, and
 - annex a sealed copy of the order of appointment as a substitute donee to the declaration lodged with the first instrument executed and lodged by the substitute donee;
 - on lodgment of subsequent instruments, state the registration number of the instrument with which the sealed copy of the order was lodged; and
 - state that no further substitute donee has been appointed by the Board pursuant to section 109 of the Act in place of the declarant;
- g) When and how the donee last saw or communicated with the donor

4.2 Enduring Powers of Attorney only commencing when a declaration is made by the Guardianship and Administration Board that the donor does not have legal capacity.

- a) the declaration is to include the statements required in sub- paragraphs (a) to (g) of paragraph 4.1.
- b) a sealed copy of the order by the Board declaring that, the donor does not have legal capacity and that the power of attorney is in force must either be lodged with the enduring power of attorney or with the first instrument to be registered relying on that power of attorney.
- c) The registration number of the power of attorney or instrument with which the sealed copy of the order was lodged is to be noted on subsequent instruments lodged for registration or recording
- d) The donee of the power shall also declare that the order referred to in sub paragraph (b) has not been revoked.

5. Limit of Attorney's Power

- a) Unless expressly authorised by the power of attorney, the donee of a power may not
 - (i) transfer land of the donor to himself
 - (ii) discharge in the donor's name a mortgage given by him/her to the donor
 - (iii) make a gift of land in the donor's name
 - (iv) appoint a substitute donee
- b) Unless expressly authorised by both the power of attorney and the trust deed, where the donor is a trustee, the donee of a power of attorney cannot
 - (i) appoint a substitute trustee or additional trustees or delegate the exercise of trusts etc. or
 - (ii) perform the functions of the trustee in the donee's capacity as attorney of the donor .

An enduring power of attorney appears to be inconsistent with a power of attorney granted under Section 54 of the Trustees Act. Under a Section 54 power of attorney, a trustee may delegate the execution or exercise of all or any trusts etc only during absence from the State or physical incapacity of the trustee.

- c) Unless authorised by the memorandum and articles of association of a company, a donee cannot perform the functions of a director or secretary of that company (including the affixing and countersigning the affixing of a common seal).

It should be noted that Article of Association 65 in Schedule 3 of the Companies Code provides that the office of a director becomes vacant if the director becomes of unsound mind or a person whose person or estate is liable to be dealt with in any way under the law relating to mental health. If such an article applies then the attorney cannot validly act, in those cases where the donor ceases to be a director.

- d) The practical effect of bankruptcy in relation to land appears to be to revoke an enduring power of attorney. Bankruptcy vests the bankrupt's property in the Official Trustee or registered Trustee.

Until an application to vest the land in the Official Trustee or registered Trustee is lodged with the Registrar of Titles, legal title in the property remains with the bankrupt. However, if the Registrar has notice of the bankruptcy, e.g. a caveat by the Trustee, then the Registrar and any person dealing in the property has notice that the bankrupt (and therefore the bankrupt's attorney) cannot dispose of the property, except in accordance with the requirements of the Bankruptcy Act.

Unlike some other States, the Act does not expressly provide that bankruptcy causes legal incapacity.

- e) The donee of a power in the form of Form 1 in Schedule 3 to the Act can do on the donor's behalf anything that the donor can lawfully do by an attorney. This includes all the powers contained in the form of the Nineteenth Schedule to the TLA - subject to the qualifications and limitations specified in sub-paragraphs (a), (b), (c) and (d). It should be noted that these limitations also apply to other types of powers of attorney.

- f) A power of attorney that is in the form of Form 1 in Schedule 3 to the Act and has powers (other than those referred to in sub-paragraphs (a) and (b) expressly added will (subject to consideration of submissions) be construed as being limited in scope to the powers expressly added. That is, the addition of express powers will qualify and limit the scope of the power "to do on my behalf anything that I can lawfully do by an attorney".

This also applies where a power of attorney sets out a series of specific powers and concludes with a general clause stating that notwithstanding the above specific powers the attorney can do anything that can be lawfully done by the donor.

6. Capacity of donor when becomes a represented person

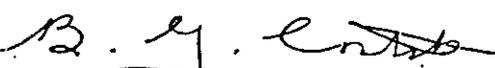
A represented person cannot execute instruments or powers of attorney (some exceptions) while an administrator's appointment remains in force (See section 77 of the Act).

7. Revocation

An Enduring Power of Attorney can be revoked by:

- Death of donor
- Revocation by donor pursuant to Sec. 143 TLA and Sec. 85 PLAct.
- Revocation by the Board or an administrator, including the Public Guardian.

A donee of an enduring power of attorney may not renounce a power during any period of legal incapacity of the donor, unless authorised by the Board.


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 LAND TITLES DIVISION

12th February, 1993